U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 June 2005

In the Matter of:
WESLEY B. WYATT,
Claimant

v. CASE NO.: 2004-BLA-5844

CONSOLIDATION COAL CO.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-In-Interest

Appearances:

W. Andrew Delph, Esquire
For the Claimant

William S. Mattingly, Esquire
For the Employer

Before: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENYING BENEFITS

This matter arises from a claim for benefits under the Black Lung Benefits Act.[1] Wesley B. Wyatt (hereinafter "the claimant") filed his initial claim for benefits under the Act on July 3, 1980. (DX 1). That claim was denied by Initial Determination dated May 8, 1981 finding that the claimant had failed to establish total disability due to pneumoconiosis. (DX 1). The claimant filed a second claim for benefits on June 16, 1982. (DX 2). The claim was denied by Initial Determination, dated May 12, 1983 finding that the claimant had failed to establish total disability due to pneumoconiosis. (DX 2). The claimant again filed for benefits on May 10, 1984. (DX 2). The District Director notified the claimant that the filing would be treated as a request for modification. (DX 2). The claimant was provided with 30 days to submit evidence. (DX 2). No further action was taken on the claim. (DX 2).

[1] The Black Lung Benefits Act, as amended, is codified at 30 U.S.C. §901 with its implementing regulations found at Title 20 of the Code of Federal Regulations. The following abbreviations are used in this decision: DX - Director's Exhibit; CX – Claimant's Exhibit; EX – Employer's Exhibit; ALJX – Administrative Law Judge's Exhibit; BCR – Board certified radiologist; B – B-reader; N/R – result not recorded.

On January 8, 1985, the claimant filed a third claim for benefits under the Act. (DX 3). The claim was denied by Initial Determination finding that the claimant failed to establish any of the elements of entitlement. (DX 3). The claimant filed a fourth claim for benefits on December 4, 1995. (DX 4). The claim was again denied by Initial Determination finding that the claimant failed to establish that his respiratory disease was caused at least in part by coal dust exposure and that he was totally disabled. (DX 4). The matter was forwarded to the Office of Administrative Law Judges where a decision was rendered on the record. (DX 4). Judge Pamela Lakes Wood issued a Decision and Order Denying Benefits on September 1, 1998 finding that the claimant failed to establish any of the elements of entitlement. (DX 4). The claim was appealed to the Benefits Review Board (hereinafter "the Board"). By an unpublished Decision and Order dated October 29, 1999, the Board affirmed Judge Lakes' decision. (DX 4).

A fifth claim for benefits was filed on November 3, 2000. (DX 5). The claim was again denied by Initial Determination finding that the claimant failed to establish that his disease was caused at least in part by coal dust exposure as well as failing to establish that he was totally disabled. (DX 5). The claim was forwarded to the Office of Administrative Law Judges for a hearing; however, before the time set for a hearing the claimant withdrew the claim. (DX 4). The claim was dismissed on December 4, 2001. (DX 4). Due to the fact that the claim was withdrawn, it is treated as if it had never been filed. 20 C.F.R. §725.306(b).

The current claim for benefits was filed on January 22, 2003. (DX 7). A Schedule for the Submission of Additional Evidence was issued on July 21, 2003 finding that if a decision were rendered at that time, the claimant would be entitled to benefits under the Act. (DX 28). A Proposed Decision and Order Awarding Benefits was issued on November 13, 2003. (DX 33). Consolidation Coal Co. (hereinafter "the employer") responded to the Proposed Decision and Order and requested a hearing before the Office of Administrative Law Judges. (DX 35 & 37). The employer refused to commence payment of benefits and the Black Lung Disability Trust Fund commenced payment. (DX 38 & 39). The employer again requested that the claim be forwarded to the Office of Administrative Law Judges on November 25, 2003. (DX 41).

A Revised Proposed Decision and Order Awarding Benefits was issued on January 22, 2004. (DX 43). The employer again requested that the claim be forwarded to the Office of Administrative Law Judges for a hearing. (DX 44, 45 & 46). The claim was so forwarded on February 9, 2004. (DX 47).

A Motion for Decision on the Record was submitted on October 29, 2004. During a telephone conference on November 17, 2004, DX 1 through 50, CX 1 and EX 1 through 4, 6 through 8, and 10 and 11 were admitted to the record in this matter. The parties also submitted post-hearing arguments that have been made a part of the record in this matter.

Issues

1.) Whether the claimant suffers from pneumoconiosis;

2.) If the claimant does suffer from pneumoconiosis, whether such condition arose out of his coal mine employment;

3.) Whether the claimant is totally disabled due to pneumoconiosis;

4.) Whether the claimant has established a material change in condition;

5.) The length of the claimant's coal mine employment; and

6.) The timeliness of the claimant's claim for benefits.

Burden of Proof

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)[3]. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. *Director, OWCP, Department of Labor v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, but the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Medical Evidence

Chest X-rays

Ex. No.	***Date of X-ray/ Date of Reading***	***Physician/Qualifications***	***Classification***
DX 22	3/3/00 – 3/3/00	Patel, BCR/B	1/1; s/t
DX 23	3/3/00 – 4/15/03	Gaziano, B	Read for quality and other abnormalities only
DX 32	3/3/00 – 8/20/03	Wiot, BCR/B	Negative
DX 40	10/1/03 – 10/1/03	Zaldivar, B	Negative
DX 42	10/1/03 – 12/19/03	Wiot, BCR/B	Negative
EX 1	12/15/03 – 12/30/03	Scott, BCR/B	Negative
CX 1	4/5/04 – 4/13/04	Patel, BCR/B	1/1; s/t
EX 7	4/5/04 – 7/12/04	Wiot, BCR/B	Negative

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[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [*Sainz*], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[4] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

CT Scans

A CT Scan, dated October 3, 2000 was offered as evidence in this matter. (EX 3). The scan was interpreted by Dr. Wiot, who is board certified in radiology and is a certified B-Reader. Dr. Wiot found no evidence of coal workers' pneumoconiosis. The October 3, 2000 CT Scan was also interpreted by Dr. Wheeler, who is also board certified in radiology and is a certified B-Reader. (EX 3). Dr. Wheeler found no evidence of coal workers' pneumoconiosis, but did find the existence of emphysema and obesity.

Dr. Scott also interpreted the same CT Scan. (EX 3). Dr. Scott is board certified in radiology and is a certified B-Reader. Dr. Scott found the CT Scan to be normal "except for a few small scattered areas of emphysema." Dr. Scott found no evidence of coal workers' pneumoconiosis. Dr. Zaldivar also interpreted the October 3, 2000 CT Scan as showing no evidence of coal workers' pneumoconiosis. (EX 3). Dr. Zaldivar found widespread emphysema throughout both of the claimant's lungs. Dr. Zaldivar is board certified in internal medicine and pulmonary disease and is a certified B-Reader.

Pulmonary Function Studies[5]

Ex. No.	***Date***	***Age*** ***Height***	***FEV1***	***FVC***	***MVV***	***Physician/*** ***Interpretation***
DX 21[6]	3/3/03	66/69	3.02	4.58	100	Rasmussen/ External spirometrics are normal. Max breathing capacity is minimally reduced. Single breath carbon monoxide diffusing capacity is moderately to severely reduced. Minimal impairment in oxygen transfer at rest.
DX 40	10/1/03	66/69	2.55 2.59	3.89 3.94	N/R N/R	Zaldivar/ Mild irreversible obstruction; air trapping by lung volumes; moderate diffusion

[5] Unless otherwise noted, the cooperation and comprehension on the testing are both noted as being "good." Additionally, unless otherwise stated, tracings are present with the testing. The second numbers listed on any testing are post-bronchodilator results.

[6] Dr. Gaziano, who is board certified in internal medicine and chest disease and is a certified B-Reader, found the testing to be of acceptable quality. (DX 19 & 20).

						impairment similar to 9/4/96
EX 1	12/15/03	67/70	2.67 2.66	3.72 3.70	70 N/R	Crisalli/ No expiratory air flow obstruction. No restrictive defect. No air trapping. Severe diffusion defect (hemoglobin corrected). No significant post-bronchodilator improvement.
CX 1	4/5/04	67/69	2.89 2.84	4.25 4.15	N/R N/R	Rasmussen/ External spirometrics are normal without significant change following bronchodilator. Single breath CO diffusing capacity markedly reduced. Minimal resting hypoxia.

Arterial Blood Gas Testing[7]

Exhibit No.	***Date***	***Physician***	***PCO2***	***PO2***
DX 18	3/6/03	Rasmussen	31	71
			31	58
CX 1	4/5/04	Rasmussen	36	73
			32	59
EX 10	9/30/04	Zaldivar	36	78

Medical Reports

Dr. D. L. Rasmussen

Dr. D.L. Rasmussen offered a report in this matter dated March 6, 2003. (DX 17). Dr. Rasmussen noted the claimant's symptoms to include sputum production, wheezing, dyspnea, morning cough and three pillow orthopnea. Dr. Rasmussen also noted the claimant's medical and employment histories. Dr. Rasmussen stated that the claimant smoked one pack of cigarettes per day for 44 years. Based on this information, as well as a chest x-ray, pulmonary function study and arterial blood gas test Dr. Rasmussen diagnosed the claimant as suffering from coal workers' pneumoconiosis based on 4 ½ years of coal mine employment as well as chest x-ray

[7] The second number listed on testing is the arterial blood gas results after the claimant was exercised.

evidence of pneumoconiosis. Dr. Rasmussen also diagnosed chronic bronchitis, artherosclerotic heart disease and sleep apnea.

Dr. Rasmussen found that the pulmonary impairment suffered by the claimant would prevent the claimant from performing his last coal mine employment. Dr. Rasmussen bases this conclusion on the fact that the claimant "exhibits very poor exercise tolerance, but has marked loss of lung function." Dr. Rasmussen went on to explain that cigarette smoking, coal dust exposure and exposure to dust in other occupations are all risk factors for the claimant. All of these risk factors have contributed to the claimant's impairment. Dr. Rasmussen found the dust exposures to be of the greatest significance. He further found that the pattern of impairment exhibited by the claimant is often found with symptomatic coal miners.

Dr. Rasmussen offered a second report in this matter, dated April 5, 2004. (CX 1). Dr. Rasmussen again noted the claimant's symptoms and smoking and employment histories. He opined that the claimant's pulmonary function studies indicate poor exercise tolerance and a marked loss of lung function. Based on the studies, Dr. Rasmussen stated that the claimant would be unable to perform his last coal mine employment.

Dr. Rasmussen further explained that the claimant was exposed to coal dust for four years and was exposed to dust and fumes in other employment. Dr. Rasmussen noted that the claimant's x-ray changes are consistent with pneumoconiosis. Therefore, Dr. Rasmussen finds it "medically reasonable" to conclude that the claimant suffers from pneumoconiosis arising out of coal mine employment and other occupational dust exposure.

According to Dr. Rasmussen, the claimant has several possible causes for his impairment in lung function. These factors include occupational dust exposure, which includes four years of coal dust exposure. The claimant was also exposed to dust and fumes when working in the machining oil industry. Dr. Rasmussen concluded that the claimant's occupational dust exposure "could clearly contribute to his impairment." Dr. Rasmussen further concluded that coal dust exposure contributes to the claimant's impairment, "even if minimally."

Dr. Rasmussen was deposed on August 9, 2004. (EX 8). Dr. Rasmussen examined the claimant on four occasions. (EX 8, p. 7). In 1982, the claimant's evaluation was normal with the exception of a reduced diffusing capacity. (EX 8, p. 9). At that time, Dr. Rasmussen believed that a minimal impairment was present. (EX 8, p. 13). The claimant was examined three times between 2001 and 2004. (EX 8, p. 14). Dr. Rasmussen opined, at the last examination of the claimant, that coal dust exposure is minimally contributing to the claimant's impairment. (EX 8, p. 14-16).

Multiple factors contributed to the claimant's impairment. (EX 8, p. 18). These factors include working with a high speed saw that was used to cut through metal and having served in the Navy for 10 years. (EX 8, p. 18-19). Dr. Rasmussen noted that the claimant does not believe that he was exposed to asbestos during his time in the Navy, "but there was a lot of asbestos on Navy ships." (EX 8, p. 19). Dr. Rasmussen stated that he cannot completely rule out the possibility that the claimant is suffering from asbestos related problems. (EX 8, p. 20). Dr. Rasmussen further stated that even without exposure to coal dust, "the claimant could have developed an impairment based on [his] other exposures." (EX 8, p. 19).

Dr. Rasmussen explained that the process that the claimant's pulmonary impairment has taken is consistent with asbestos related disease because of the long latency period. (EX 8, p. 20). The pattern is unusual when looking at coal dust related exposures; however, Dr. Rasmussen believes the pattern is consistent with coal dust induced lung disease. (EX 8, p. 20). Based on this process and the fact that the process is consistent with coal dust related lung

disease, Dr. Rasmussen is attributing some part of the claimant's impairment to his exposure to coal dust. (EX 8, p. 20).

Dr. Rasmussen went on to discuss his 2004 evaluation of the claimant. He noted the symptoms reported by the claimant as well as a 40 year smoking history. (EX 8, p. 21-24). This history "could have caused a great deal of damage to [the claimant's] lungs." (EX 8, p. 25). Dr. Rasmussen finds the presentation of the claimant's lung disease to be abnormal for a smoking related impairment, but he does find that the smoking history has contributed. (EX 8, p. 25).

According to Dr. Rasmussen, the claimant has the pulmonary reserve to perform his last coal mine employment. (EX 8, p. 25). From a pulmonary standpoint, the claimant could continue to perform his last coal mine employment. (EX 8, p. 26). Dr. Rasmussen stated that the progression seen with the claimant is more typical of asbestosis, but he was unable to diagnose asbestosis because he did not "get a clear history of asbestos exposure." (EX 8, pp. 29-30). If the claimant were found to have had a definite exposure to asbestos, Dr. Rasmussen would state that there is a greater probability that the claimant's condition was caused by asbestos exposure. (EX 8, p. 30). However, Dr. Rasmussen stated that even if there were found to be a history of asbestos exposure, the claimant's exposure to coal dust would contribute to his condition, even if minimally. (EX 8, p. 30). Dr. Rasmussen concluded that it is very difficult to reach a definitive diagnosis without a biopsy. (EX 8, p. 30).

Dr. Rasmussen opined that "less than one-half" of the claimant's disease was caused by coal dust exposure. (EX 8, p. 31). Dr. Rasmussen is unable to state what caused the remaining part of the claimant's disease. (EX 8, p. 31). The possible causes of the claimant's pulmonary disease are idiopathic, non-occupational, 4 to 4 ½ years of coal dust exposure, history of working with a high speed saw to cut metal and "whatever he did on board" the ships while in the Navy. (EX 8, pp. 31-32).

The claimant's pulmonary impairment is due, at least in part, to the claimant's history of cigarette smoking. (EX 8, p. 36). The claimant does not exhibit the airway disease usually associated with cigarette smoking, but "has changes that could be consistent with emphysema due to" his cigarette smoking history. (EX 8, p. 37). Dr. Rasmussen stated that he is unsure of all of the claimant's exposures over the years, but coal dust exposure can cause the kind of impairment seen in the claimant. (EX 8, p. 38). Dr. Rasmussen does not believe that the claimant's relatively short exposure to coal dust is the complete cause of the claimant's impairment, but he also cannot say that coal dust exposure did not contribute to the claimant's condition. (EX 8, p. 38). Because he cannot give a reason that coal dust exposure did not contribute to the claimant's condition, he believes that it did contribute, although to what degree he is unable to determine. (EX 8, p. 40).

Dr. George L. Zaldivar

Dr. George L. Zaldivar examined the claimant on October 1, 2003 and offered a report of his examination on November 25, 2003. (DX 40). Dr. Zaldivar is board certified in internal medicine, pulmonary disease and critical care medicine and is a certified B-reader. Dr. Zaldivar based his opinion on both his examination of the claimant as well as a record review. At the time of the examination, Dr. Zaldivar noted the claimant's employment history. Dr. Zaldivar also noted the claimant's symptoms. Based on his examination as well as the diagnostic testing, Dr. Zaldivar concluded that the claimant does not suffer from coal workers' pneumoconiosis.

Dr. Zaldivar did find the existence of a pulmonary impairment in the claimant. He attributes this impairment to pulmonary fibrosis. According to Dr. Zaldivar, pulmonary fibrosis

does not result from coal dust exposure. The condition might be the result of cigarette smoking or may be the result of an undetermined cause, but the condition is not the result of coal dust exposure. Dr. Zaldivar opined that the claimant would be unable to return to his previous coal mine employment. However, the impairment present is the result of pulmonary fibrosis unrelated to coal mine employment.

A supplemental report, dated April 26, 2004 was offered by Dr. Zaldivar in this matter. (EX 2). Dr. Zaldivar reviewed the available medical records and determined that insufficient evidence exists to justify diagnosing coal workers' pneumoconiosis in the claimant. Dr. Zaldivar did find the existence of a pulmonary impairment that presents as a diffusion impairment which "is not accompanied by a restriction or an obstruction." He attributes this impairment to pulmonary fibrosis unrelated to coal workers' pneumoconiosis or silicosis. From a pulmonary standpoint, the claimant "may be permanently disabled from performing his usual coal mine work according to the low diffusion capacity and blood gas testing by Dr. Rasmussen in the past." Dr. Zaldivar does not attribute this impairment to coal dust exposure.

A third report was issued by Dr. Zaldivar on May 31, 2004. (EX 4). Dr. Zaldivar stated that the claimant's pulmonary impairment arose sometime after the testing done by Dr. Rasmussen in 1982. The claimant last worked in 1975 and the impairment occurred sometime after 1982. Dr. Zaldivar opined that the only disease process that would have that long of a latency period would be asbestosis. Dr. Zaldivar believes that the claimant acquired this condition during the time that he served in the Navy. Again Dr. Zaldivar finds the presence of pulmonary fibrosis unrelated to coal dust exposure. The claimant is permanently disabled from a respiratory standpoint, but the impairment is unrelated to the claimant's work as a coal miner.

Dr. Zaldivar issued a fourth report in this matter dated September 30, 2004. (EX 10). The purpose of the report was to outline and discuss the results of the arterial blood gas testing he conducted on September 15, 2004. Dr. Zaldivar found the presence of an isolated abnormal diffusion capacity with normal spirometry and lung volumes. This result lead Dr. Rasmussen to conclude that the claimant suffers from pulmonary fibrosis unrelated to his coal dust exposure.

Dr. Zaldivar was also deposed on October 20, 2004. (EX 11). Dr. Zaldivar outlined the claimant's coal mine employment history as well as noting a 20 plus pack year smoking history. (EX 11, pp. 9-15). Dr. Zaldivar also discussed the claimant's history of service in the Navy from 1959 to 1969 at which time Dr. Zaldivar believes that the claimant was exposed to asbestos when he worked on ships and when he "physically handled asbestos working with contractors." (EX 11, pp. 33-34). Dr. Zaldivar does not believe that the claimant's exposure to coal dust was sufficient for him to have developed coal workers' pneumoconiosis. (EX 11, p. 10). Dr. Zaldivar opined that if the exposure were so intense during such a short period of time so as to develop coal workers' pneumoconiosis, the disease process would have been noticeable much earlier. (EX 11, p. 12).

Based on the pulmonary function testing completed at the time of his examination of the claimant, Dr. Zaldivar found that the claimant has a severe diffusion capacity abnormality. (EX 11, p. 23). This lead Dr. Zaldivar to conclude that the claimant is suffering from pulmonary fibrosis unrelated to coal dust exposure. (EX 11, p. 24). Dr. Zaldivar stated that the claimant's chest x-rays do not show evidence of coal workers' pneumoconiosis. (EX 11, pp. 25-26). Dr. Zaldivar also discussed the claimant's October 3, 2000 CT Scan that he believes showed "honeycombing" that resulted from emphysema "acquired through his life and pulmonary fibrosis." (EX 11, p. 29).

Dr. Zaldivar opines that the claimant's testing "fits well" with the diagnosis of an asbestos related lung disease. (EX 11, p. 35). It takes a minimum of 20 years to develop an asbestos related lung disease, according to the doctor. (EX 11, p. 35). Dr. Zaldivar also believes that an asbestos related lung disease appears on the claimant's chest x-rays with pulmonary fibrosis. (EX 11, p. 35).

The claimant's pulmonary function presented with a combination of air trapping due to emphysema as a result of smoking then developed into a low diffusion capacity as a result of pulmonary fibrosis from asbestos exposure. (EX 11, p. 37). Dr. Zaldivar opines that the claimant's disease process fits within the pulmonary fibrosis category. (EX 11, p. 37). Without a confirmed history of asbestos exposure; however, Dr. Zaldivar believes that other causes would have to be explored. (EX 11, p. 37). Dr. Zaldivar does not believe that three years of coal mine employment is sufficient to cause the abnormality seen with the claimant. (EX 11, p. 39). According to Dr. Zaldivar, none of the literature supports a conclusion that pulmonary fibrosis can arise from coal workers' pneumoconiosis. (EX 11, pp. 47-48).

Dr. Zaldivar goes on to state that a diffusing capacity abnormality producing this type of blood gas abnormality "has never been found in coal miners." (EX 11, p. 41). Dr. Zaldivar believes that the claimant is totally disabled, but that disability was not contributed to by coal workers' pneumoconiosis because Dr. Zaldivar does not believe that the claimant suffers from this condition. (EX 11, p. 44). Coal mine employment did not contribute to or cause any of the claimant's impairment nor has coal mine employment aggravated or caused the claimant's pulmonary impairment. (EX 11, p. 44).

Dr. Robert Crisalli

Dr. Robert Crisalli examined the claimant on December 15, 2003 and offered a report dated January 20, 2004. (EX 1). Dr. Crisalli is board certified in internal medicine and pulmonary disease. (EX 1). In offering his opinion, Dr. Crisalli noted the claimant's symptoms to include shortness of breath, productive cough and ankle edema. Dr. Crisalli also included a detailed history and physical examination that outlined the claimant's medical, social and occupational histories. Dr. Crisalli noted a 30 to 35 pack year smoking history.

Based on a chest x-ray interpreted by two readers, a pulmonary function study and a review of the claimant's medical records, Dr. Crisalli found that the claimant does not suffer from any occupational lung disease. Dr. Crisalli found no obstruction or restriction on the claimant's pulmonary function testing. The only abnormality noted was that of a reduced diffusion capacity.

Dr. Crisalli found insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. According to the doctor, the chest x-rays are normal or those that are not normal exhibit a pattern consistent with pulmonary fibrosis. Dr. Crisalli opined that when looking at the claimant's condition as a whole, the claimant has a defect in his oxygen transfer, but that defect is not related to his coal dust exposure. Dr. Crisalli finds the pattern of the claimant's pulmonary impairment to be inconsistent with coal dust exposure related disease or tobacco-related pulmonary disease. Dr. Crisalli concluded that the miner would be unable to perform his previous job in the coal mine from a pulmonary standpoint, but that such impairment is not related to coal dust exposure or coal workers' pneumoconiosis.

A supplemental report, dated July 6, 2004 was also offered by Dr. Crisalli in this matter. (EX 6). Dr. Crisalli was given additional evidence to review, none of which changes his prior opinion. Again Dr. Crisalli found that the claimant does not suffer from coal workers'

pneumoconiosis, but the claimant is totally disabled from a pulmonary function standpoint unrelated to coal dust exposure.

Findings of Fact and Conclusions of Law

Responsible Operator

Consolidation Coal Co. has not contested that it is the properly designated responsible operator in this matter. I find nothing in the record to dispute that the named employer is the proper responsible operator. Therefore, I find that Consolidation Coal Co. is the proper responsible operator and is responsible for any award of benefits to the claimant.

Timeliness

The Act at 30 U.S.C. §932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later:" (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. §725.308 (2000) and (2001) are more liberal to the claimant and read, in part, as follows:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within 3 years **after** a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner or within 3 years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.
>
> (b) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

Emphasis added.

It is noteworthy that the Board has held that the statute of limitations applies only to the first claim filed, *Andryka v. Rochester & Pittsburgh Coal Co.,* 14 B.L.R. 1-34 (1990), and it is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled, *Daugherty v. Johns Creek Elkhorn Coal Corp.,* 18 B.L.R. 1-95 (1994).

In light of the Board's holding in *Andryka* as well as the fact that the employer has not offered any evidence to demonstrate that the claim was not timely filed, I find that the claimant's claim was timely filed. The claimant filed his first claim for benefits on July 3, 1980. (DX 1). It appears that the first time that the claimant was informed that he was totally disabled was by Dr. Zaldivar in 1997. (DX 4). It is important to note that Dr. Zaldivar did not attribute this disability to pneumoconiosis. (DX 4). Not until January 2001 was the claimant told that he was totally disabled due to pneumoconiosis. (DX 5). Therefore, it appears that the claimant filed his claim some 28 years before a physician informed him that he was totally disabled due to pneumoconiosis. This clearly fits within the 3 year time limitation included in the statute. Therefore, I find that the claimant's claim was timely filed.

Length of Coal Mine Employment

The applicable regulations governing how to compute the length of coal mine employment state that

> [t]he presumptions set forth in Sections 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumptions. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. §725.101(a)(32).

20 C.F.R. §725.301(2001). The provisions at §725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
>
> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 days in a calendar year or partial periods totaling a year, shall not establish more than one year.
>
> (ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension earnings, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
>
> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the

> record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(2001).

Applying the criteria set forth in 20 C.F.R. §§725.301 & 725.101(a)(32), I find that the claimant was employed in coal mine employment for 2.22 years. The claimant worked in coal mine employment during the years of 1958, 1975, 1976 and 1977. (DX 11). To compute the length of coal mine employment, I have employed the formula set forth at §725.101(a)(32)(iii). The claimant earned $336.00 while engaged in coal mine employment in 1958. The average daily wage for that year was $19.32 resulting in 17.39 days of coal mine employment for 1958. In 1975, the claimant earned $8990.42. The average daily wage for that year was $59.24 resulting in credit for one full year of coal mine employment. The claimant is also entitled to credit for one year of coal mine employment for 1976 as he earned $8021.03 with an average daily wage of $64.07 for 1976. For the year of 1977, the claimant earned $688.37 in coal mine employment. The average daily wage for that year was $71.90, entitling the claimant to credit for 9.57 days.

The claimant worked partial years in 1958 and 1977. Pursuant to §725.101(a)(32)(i), I have added together the days worked in 1958 and 1977 and divided that number by 125, resulting in credit for .22 of a year worked. Pursuant to §725.101(a)(32)(iii), a copy of the BLS table is included in the record at DX 11. The claimant alleges 4 ½ years of coal mine employment; however, the earning records included in the record only supports a finding of 2.22 years of coal mine employment. I find the evidence establishes that the claimant was employed in coal mine employment for 2.22 years.

Material Change in Condition

This is the claimant's sixth claim for benefits, but as it was filed on or after January 19, 2001, it must be adjudicated under the new regulations. Although the new regulations dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc.*, 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in condition is established, the fact finder must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). The Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n. 11.

The claimant's fifth claim for benefits under the Act was withdrawn and dismissed with prejudice. (DX 4). According to §725.306(b), that claim must be treated as if it were never filed. The claimant's fourth application for benefits was denied because the evidence failed to show that: (1) the claimant had pneumoconiosis; (2) the pneumoconiosis arose, at least in part, out of coal mine employment; and (3) the claimant was totally disabled by pneumoconiosis. (DX 4). The claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred.

Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment. 20 C.F.R. § 718.201.

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

The claimant has the burden of proving the existence of pneumoconiosis. The regulations provide the means of establishing the existence of pneumoconiosis by: (1) chest x-ray evidence; (2) biopsy or autopsy evidence; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(1)-(4).

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that section's presumptions are applicable to a living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence. 20 C.F.R. § 718.202(a)(1). "[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." *Id.; Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985)." Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985).

I am not required to defer to the numerical superiority of x-ray evidence, although it is within my discretion to do so. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990). There are seven interpretations of four chest x-rays included in the claimant's current claim for benefits. Two are interpreted as showing pneumoconiosis while the other five are negative. The two positive interpretations were rendered by Dr. Patel, a dually qualified physicians. Four of the negative interpretations were rendered by dually qualified physicians and one was rendered by a certified B-reader. I give greater weight to the several readings by equally qualified radiologists. Considering this information, I find that the claimant has failed to establish that he suffers from pneumoconiosis by a preponderance of the chest x-ray evidence.

The claimant may also establish the existence of pneumoconiosis if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983).

Dr. Rasmussen opines that the claimant suffers from coal workers' pneumoconiosis based on the chest x-ray evidence and the claimant's history. (DX 17, CX 1 & EX 8). Drs. Zaldivar and Crisalli found that there was no evidence of coal workers' pneumoconiosis. (DX 40, EX 1, 2, 4, 6, 10 & 11). As noted, I do not accept that the x-ray evidence is dispositive of pneumoconiosis.

Dr. Rasmussen testified that he does not believe that the claimant's relatively short exposure to coal dust is the complete cause of the claimant's impairment, but he also cannot say that coal dust exposure did not contribute to the claimant's condition. (EX 8, p. 38). Because he cannot give a reason that coal dust exposure did not contribute to the claimant's condition, he believes that it did contribute, although to what degree he is unable to determine. (EX 8, p. 40).

Employer argues that Dr. Rasmussen's opinion is limited by a misunderstanding the length of coal mine employment. It argues and the record substantiates that the Claimant worked half as much in coal mine employment as attributed. Further, Mr. Wyatt's deposition was taken after Dr. Rasmussen's evaluations and deposition. Mr. Wyatt testified that he has not only already been compensated for asbestos related lung disease, but that he was awarded disability based on his exposures while in the Navy. I am also directed to Dr. Rasmussen's report and testimony, where he concluded by saying the impairment could have been related to coal dust exposure, but in conclusion, he had to agree that it "may" or" may not" be causing part of any pulmonary disease. 14. at 34-39.

A "'documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co*., 10 B.L.R. 1-19 (1987). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, *supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989)(en banc).

Given that Dr. Rasmussen's opinion rests in large part on the x-ray evidence, and given the factual errors are manifest, I do not accept the report and opinion as "reasoned". *Fields*. It is proper to discredit a medical opinion based on an inaccurate length of coal mine employment. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993)(per curiam) (physicians reported an eight year coal mine employment history, but the ALJ only found four years of such employment); *Trumbo v. Reading Anthracite Co*., 17 B.L.R. 1-85 (1993) (physician's opinion less probative where based on inaccurate smoking history). I also note that in reading the report and deposition, that Dr. Rasmussen's opinion regarding pneumoconiosis was not rendered to any reasonable degree of probability or certainty. *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91 (1988). Therefore, I discount it on that basis alone.

Therefore, I find that the Claimant has failed to meet the burden of proof. *Department of Labor v. Greenwich Collieries* [Ondecko], *supra*.

Alternatively, I find the opinions of Drs. Crisalli and Zaldivar, as well as those of the radiologists who interpreted the CT Scan, to be better reasoned and based on the objective medical evidence. Additionally, I find that the opinions of Drs. Crisalli and Zaldivar take into consideration the totality of the claimant's occupational and social histories. Therefore, I find that the claimant has failed to establish the existence of pneumoconiosis by a preponderance of the physician opinion evidence.

Taking into consideration all of the pertinent evidence pertaining to the existence of pneumoconiosis, I find that the claimant has failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *See Island Creek Coal Co. v. Compton,* 211 F.3d 203 (4th Cir. 2000).

Conclusion

Upon consideration of the evidence of record, Claimant has not established the presence of pneumoconiosis as required by Section 718.202. I find the newly submitted evidence fails to establish a change in conditions. Mr. Wyatt failed to establish a necessary element of his claim. *Oggero v. Director, OWCP, supra.* Therefore, his claim for benefits will be denied.

ORDER

It is ordered that the claim of Wesley B. Wyatt for benefits under the Black Lung Benefits Act is hereby **DENIED**.

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20018-7601. A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.